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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 133

THOS. A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.,

vs.

J. L. RICHARDSON.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RECEIVER.

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BRIEF FOR RECEIVER.

Statement of Case.

The Circuit Court of Appeals for the Fourth Circuit has certified to this Court the following question:

> "Is one who purchases shares of stock of a national bank liable for an assessment subsequently imposed by the Comptroller of the Cur-

rency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser, with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?''

In the statement preceding the certified question, it appears that Richardson, the defendant, purchased ten shares of bank stock of the Farmers & Merchants National Bank of Lake City, S. C., on November 18, 1925; six shares on January 10, 1926, and three shares on May 18, 1926. The bank was closed on account of insolvency on October 9, 1926. The defendant purchased the shares with his own money and took the certificates, endorsed in blank, into his own keeping. Between the time of purchase and the time of surrender to the registry officer of the bank the shares were in his possession, under his control, and he had taken on himself neither charge nor duty, legal or moral, to make his intended gift of the stock to his children. This intention was declared only when he took the certificates to the banking-house and surrendered them to the registry officer of the bank.

It is conceded that the defendant did not have knowledge of the failing condition of the bank; for, if he had, it is most unlikely that he would have bought the stock; but it is, nevertheless, a matter of fair inference, of which the Court may properly take cognizance, that the great number of bank failures over the entire country, particularly in South Carolina, continuing over a period of almost five years, would naturally incline the purchaser of bank stock, even if he did not have knowledge of the failing condition of the bank, to risk the investment for his children rather than for himself, if they, because of their infancy, could enjoy the benefits accruing to shareholders and escape liability if the bank should fail.

ARGUMENT.

Summary of Argument.

A judgment should have been awarded the receiver for the entire amount of the stock assessment, as the defendant purchased such stock from the former shareholders, paid his own money, and personally received delivery of the certificates, which were endorsed in blank; and his gift of the stock to the infant transferees, being burdensome to the infants, since it was subject to the liability for the statutory assessment, should be treated, as a matter of law, as being ineffective to relieve the defendant from his liability for the assessment.

Supporting Citations.

Foster *v.* Chase, 75 Fed. 797; Aldrich *v.* Bingham, 131 Fed. 363; Weston's Case, L. R. 5 Ch. App. 614;

Richardson's Case, L. R. 19 Eq. 588; Castleman *v.* Holmes, 4 J. J. Marshall's Rep. (Ky.) 1; Roman *v.* Fry, 5 J. J. Marshall's Rep. (Ky.) 634; Kerr *v.* Urie, 86 Md. 72; 38 L. R. A. 119; 63 Am. St. Rep. 493; Ruchizky *v.* DeHaven, 97 Pa. St. 202; Thompson on Corporations (3rd Ed.), sections 4043, 4900; Cook on Corporations (7th Ed.), section 250; Fletcher's Cyclopedia of Corporations, sections 4187, 4203. See, particularly, Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, and following note: Decision affirmed in Johnston *v.* Laflin, 103 U. S. 800; 26 L. Ed. 532.

Brief of Authorities.

I.

Preliminary considerations affecting the question involved in this appeal are as follows:

(1) LIABILITY FOR ASSESSMENT IS STATUTORY AND ATTACHES AS A LEGAL INCIDENT TO THE OWNERSHIP OF BANK STOCK.

> "The only persons holding shares of national bank stock whom the statute exempts from this responsibility are executors, administrators, guardians and trustees. Section 5152. **It is not for the courts, by mere construction to recognize an exemption which congress has not given.**" Keyser *v.* Hitz, 133 U. S. 138; 33 L. Ed. 531.
>
> "Such statutory liability was created for the protection of creditors and in order to strengthen the bank in the confidence of the public * * * **and the right of the receiver to maintain this action depends upon, and has its sanction in,**

> **the statute creating liability against each shareholder in whatever way he may have become such.** * * * The statute, in effect, says to all who become owners of national bank stock, no matter in what way they became shareholders, that **they cannot enjoy the benefits accruing to shareholders, and escape liability** for the contracts, debts and engagements of the bank. In other words the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders—**executors, administrators, guardians or trustees only being exempted from individual liability.**" Christopher *v.* Norvell, 201 U. S. 216; 50 L. E. 732.

(2) THE REAL OWNER OF NATIONAL BANK STOCK IS LIABLE EVEN IF THE STOCK IS NOT REGISTERED IN HIS NAME.

In Pauly *v.* Trust Co., 165 U. S. 606, 41 L. Ed. 844, 849, Mr. Justice Harlan, after analyzing the prior cases relating to the liability of shareholders in national banking association, states the rule deducible therefrom and, among other things, says that—

> "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of the U. S. Rev. St., Sec. 5151."

In Houghton *v.* Hubbell, 91 Fed. 453 (C. C. A., 1st Circuit), the syllabus shows an illustration of the application of the above-stated rule, as follows:

> "The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency and the receiver may bring an action at law for the collection of such assessment directly against him without regard to the liability of the agent."

In holding that the form of registration might be disregarded and the suit brought directly against the real owner of the shares, the Court said:

> "In doing as in this case, the Comptroller elected the more equitable of the legal remedits, and the one which sensibly avoided circuity of action and unnecessary litigation, by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall."

(3.) As between the transferrer and the transferee the transfer of shares is completed when the certificate of the stock is delivered, endorsed in blank, to a person competent to purchase and hold them.

> "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank. * * * But as between the

parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price paid. * * * The subsequent filling up of the blank by him (the purchaser) with another name instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transactions." Johnston *v.* Laflin, 103 U. S. 800, 803; 26 L. Ed. 532.

See, also:

Stowe *v.* Harvey, 241 U. S. 199, 60 L. Ed. 952.

(4.) A GIFT BECOMES COMPLETE ONLY WHEN ACCEPTED BY THE DONEE. A GIFT MADE TO AN INFANT, EVEN IF ACCEPTED, IS SUBJECT TO REPUDIATION WHERE A BURDEN ATTACHES TO THE DONATION.

"As a delivery is necessary, it follows, as a further requisite to a valid donation, that the donee must accept it. Such acceptance, however, will be presumed when the gift is for his advantage, in the absence of all contrary evidence." Pomeroy's Equity Jurisprudence (4th Ed.), section 1149, vol. 3, pages 2665, 2668.

"An unmistakable and unconditional acceptance on the part of the donee is an essential element to the validity of a gift *inter vivos*. * * * A gift of property to a person without his knowledge, if made in proper form, vests the property in him at once subject to his right to repudiate it when informed thereof." 28 *C. J.* 643, 644.

"It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation, the law does not force it upon him against his will. This must be so upon every principle of reason and justice. * * * In the case of a minor who is presumed in law to be incapable of exercising a sound discretion over his affairs and is, therefore, not bound by his contracts, unless in exceptional cases, there is the greater reason for presuming that he has accepted what is for his advantage. In other words, if it is for his advantage, the law accepts it for him and will hold the donor bound; but, if not for his advantage, the law will repudiate it at the instance of the minor, even though he may in terms have accepted it." Delevillain *v.* Evans, 39 Cal. 120.

(5.) THE ACCEPTANCE OF BANK STOCK TRANSFERRED ON THE BOOKS OF THE BANK WILL NOT BE PRESUMED, AND THE LIABILITY OF OWNERSHIP OF THE STOCK DOES NOT ATTACH WHERE THE TRANSFER IS MADE WITHOUT THE CONSENT AND KNOWLEDGE OF THE TRANSFEREE.

"Under the national banking act the individual liability of the stockholder is an essential element of the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. * * * Its obligation becomes a part of every contract, debt or engagement of the bank itself, as much so as if they were made directly by the stockholder

instead of by the corporation." Richmond *v.* Irons, 12 U. S. 27; 30 L. Ed. 864; Matteson *v.* Dent, 176 U. S. 521; 44 L. Ed. 571.

"In Keyser *v.* Hitz, 133 U. S. 138, which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this Court approved a charge: '**If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of defendant, without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer.**' And it was further said: 'We must not be understood as saying that the mere transfer of the stock on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank.' " Williams *v.* Vreeland, 250 U. S. 295, 299; 63 L. Ed. 989.

II

There was both lack of assent and legal incapacity on the part of the infants to receive the gift of bank stock burdened with the liability for assessment.

The defendant's money purchased the stock and the certificates assigned in blank were delivered to him

personally. As between the sellers of the stock and the defendant the transaction was complete when the stock was delivered. Title to the certificates passed to the defendant. His liability for the stock assessment did not depend on the registration of the stock in his name. Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, Fed. Cas. No. 7393; affirmed 103 U. S. 800; 26 L. Ed. 532. Nor could registration of these shares in the name of his infant children relieve the defendant from liability for the assessment where the transfer was the unauthorized act of the defendant. Pauly *v.* Trust Co., 165 U. S. 606; 41 L. Ed. 844. He could not, merely by placing the stock in the names of his children, subject them to the burden of stock assessment that is a legal incident of ownership. Williams *v.* Vreeland, 250 U. S. 295; 63 L. Ed. 989. There is not even the suggestion that either of the children had agreed to the transfers or that they knew, when the bank closed because of insolvency, that the stock had been placed in their names. Under such circumstances, regardless of any question of capacity to assume the obligation, they could not be held chargeable with liability for the ownership of the stock. As infants they were, moreover, under a legal incapacity which would be controlling against the presumption of acceptance of the gift. 31 *C. J.* 1024; DeLevillain *v.* Evans, 39 Cal. 120.

GENERAL AUTHORITIES.

"Under a well understood rule a tranfer of shares to an infant is not void, but is voidable

in the sense that the tranfer may be rejected by the directors, and avoided by the infant within a reasonable time after attaining his majority, so as to relieve himself from liability to creditors for debts of the corporation." 14 *C. J.* 1014.

In Cook on Corporations (7th Ed.), section 250, it is said:

"* * * And any person subscribing for shares in the name of an infant renders himself personally liable thereon. * * * So, likewise, when shares are assigned or transferred to infants as a contrivance to escape liability, the transferrer remains liable. **And this is the rule as to an infant transferee, although the transfer was bona fide, and even in ignorance of the infancy of the transferee.**"

Also, in section 396 (same work), it is declared:

"If the tranferee of a certificate of stock is an infant or person of unsound mind, the corporation may refuse to register such transferee as a stockholder. The reason of the rule is that such persons would not be obliged at law to respond to the obligations of a stockholder, and consequently are not entitled to its privileges."

In Thompson on Corporations (3rd Ed.), section 4459, it is said:

"It is the rule, too, that a transfer to an incompetent person, that is, a person who by reason of infancy or coverture is not competent to discharge the duties and to assume the lia-

> bilities of a stockholder, will not relieve the transferrer from liability. * * * A transfer to an infant will not relieve the transferrer from liability unless the infant has reached his majority and ratified the transfer."

In section 4043 (same work), the rule is stated:

> "In the absence of any qualifying statutory provisions on the subject, the contract of an infant to take shares of stock is the same as any other contract made by or for the infant with reference to ordinary personalty. Such contracts are generally held voidable at the election of the infant on attaining his majority, but not void. * * * The rights of the parties are reciprocal and **a contract for the sale of stock by the corporation to an infant may be avoided by the corporation or its representative at any time before ratification by the infant after attaining his majority.** Hence, if the corporation is wound up before such action by the corporation, **the person who had purchased the shares for the infant * * * may be held liable, since it will not be assumed that the infant would ratify the transaction when the time came for him to make his election.**"

Also, in section 4900 (same work), it is declared:

> "Under theories already pointed out, a subscriber or a purchaser of stock who takes the same in the name of a person who is *non sui juris* is subject to these statutory liabilities. **This rule applies especially where the stock is taken in the name of an infant.**"

A like statement appears in Fletcher's Cyclopedia of the Law of Private Corporations, section 4187:

> "**One who purchases or subscribes for stock in the name of an infant becomes himself liable as a stockholder to creditors of the corporation,** and his liability is not affected by the fact that, after the insolvency of the corporation and an assessment against him, but before an action is commenced by the receiver to collect the assessment, the infant becomes of age, and affirms the subscription or purchase."

Also, in section 4203 (same work), it is stated:

> "In order to relieve the tranferrer from his statutory liability or from liability for the balance due on his stock, **the tranfer must not only be made to a person legally capable of holding the stock transferred, but also to one who is legally capable of assuming the obligations of a stockholder, and who is not at liberty to repudiate them.** So a person who transfers stock to an infant will remain liable to creditors unless the infant has in the meantime attained his majority and ratified the transfer, even **though the corporation was solvent when the transfer was made.**"

In Ruchizky *v.* DeHaven, 97 Pa. St. 202, cited in footnote to section 250, Cook on Corporations (7th Ed.), it was held that a broker purchasing shares for the account of an infant was held liable as holder of the stock, not even his broker's agency protecting him. The reason of the decision was:

> "Ruchizky was a minor, and hence was entitled to legal protection and guardianship. It

> is said they knew not that he was a minor; but what does that matter? He was, nevertheless, an infant and their want of knowledge did not make him *sui juris.*"

In Kerr *v.* Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, it was said:

> "If persons were allowed to subscribe for stock in a national bank or in any other corporation where a personal liability attaches, either as attorney for an unnamed principal, as self-appointed trustee for some unnamed *cestui que trust,* or as attorney for an unnamed infant of tender years, and, when called upon to pay the debts of the bank to the extent of the stock so subscribed, could escape by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations which are found in great numbers in every state would be deprived of the only certain means provided by law for the payment of their claims. **But in addition to this, it is well settled upon authority that one assuming to act as Mrs. Urie has acted becomes personally bound. The infant not being liable, liability attaches to the person who makes the subscription, and if that person has transferred the stock to one capable of using and holding it, the liability passes on to the latter. Cook on Stock and Stockholders, Sec. 67.**"

Also, in Roman *v.* Fry, 5 J. J. Marshall's Reports (Ky.) 634, the Court said:

> "If Dallam were permitted to escape by taking stock in the names of infant children, the

whole object of the charter in securing the community against the insolvency of the corporation might be defeated. We cannot suffer it to be done. Such a thing would be a fraud on the community. We see no good reason why the Court should have opened the decree to receive the supplemental answer of Dallam."

FEDERAL CASES.

The two federal cases usually cited are both District Court cases—Foster *v.* Chase, 75 Fed. 797, District of Vermont, Wheeler, District Judge; and Aldrich *v.* Bingham, 131 Fed. 363, Western District of New York, Hazel, District Judge. The ruling in each of these cases is that the father is responsible for the stock assessment.

In Foster *v.* Chase, Judge Wheeler said:

"The plaintiff claims that the defendant made himself liable for the assessment because of the incapacity of the children to take the stock and make themselves liable for it. He insists that they only are the shareholders, and liable, if anyone is. Assent is necessary to becoming a shareholder, subject to this liability, in a national bank. Keyser *v.* Hitz, 133 U. S. 138. Minors do not seem to have anywhere the necessary legal capacity for that. The principles upon which this disability rests are elementary and universal. In buying and paying for this stock, and having it placed on the books of the bank, the defendant acted for himself; in having it placed there in the names of his children, as with their assent, he assumed to act for them.

> As they could not themselves so assent as to be bound to the liabilities of a shareholder, they could not so authorize him to assent for them as to bind them. To the extent that they could not be bound, he acted without legal authority, and bound only himself."

In Aldrich *v.* Bingham, Judge Hazel also said:

> "It is a well established rule of law that a transfer of stock in a corporation must be made to a person or corporation not only legally capable of holding the stock transferred, but also to one who is legally bound to respond when assessments are made upon the stock, and who may lawfully assume the liabilities of the transferrer in relation thereto. It need not necessarily have been transferred to a person who is responsible in the sense that he will be able to financially meet the liabilities imposed upon a stockholder, **but it is essential that he shall be legally liable to assume such obligations, and not be at liberty to repudiate them.** Upon this point the cases collated at the end of the opinion in Johnston *v.* Laflin, Fed. Cas. No. 7, 393, which involve the liability of the transferrer of stock in a national bank, are instructive.

The résumé follows:

> " 'An infant cannot become purchaser and transferee of shares so as to relieve the transferrer of liability as a shareholder (Nickalls *v.* Merry, L. R. 7 H. L. 530), even though the transfer to the infant be registered (Symon's Case, 5 Ch. App. 298; Weston's Case, Id. 614). * * * The original shareholder remains a shareholder, even in cases where he is entirely innocent of

the transaction, and not aware that the shares were being transferred to an infant, Lord Chancellor Hatherly, Weston's Case, 5 Ch. App. 614, 620.'

"The principle of law announced in Johnston *v.* Laflin, to the effect that an infant cannot become purchaser and transferee of shares so as to relieve the transferrer of liability as a shareholder has been many times approved, and is applicable to this case. Cook on Stock and Stockholders & Corporation Law, Sec. 250. * * * It is insisted that the bank acquiesced in this transfer by the defendant, and recorded the same in its corporate stock book; that such transfer is voidable, and not void, at the election of the infant when he reaches full age. The soundness of this contention is not debatable, nor indeed, is it denied that generally it will not be presumed that an infant will seek to avoid his obligation because of his infancy. * * * These propositions have little relevancy, conceding, as we must, that **the liability of the shareholder in a national bank is not contractual, but rests on a statutory liability which the executive officers of a national bank cannot waive. * * * The law properly imposes upon shareholders in a national bank a conditional liability as a protection and shield to depositors and general creditors. That protection cannot be removed by sales and transfer of stock to infants and other purchasers who cannot legally contract to accept the same.**"

The case of Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, Fed. Cas. No. 7393, affirmed 103 U. S. 800, 26 L. Ed. 532, has been already cited in this brief

as authority for the position that the purchaser's liability for the stock assessment did not depend on the registration of the stock in his own name. Another point of the opinion, evidently deemed fundamental, was that the liability of the purchaser continues until he transfers to some person capable of taking and holding the shares "who is in law capable of assuming the liabilities of the transferrer."

Shares of bank stock were bought from Laflin through a broker at the instance of James H. Britton, President of the bank. The transfer was entered on the official stock register, in the name of James H. Britton, trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Laflin had no actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had thus been used to pay for it, nor of the entries in respect thereto in the books of the bank. The stock was assigned in blank, with the power of attorney in blank duly endorsed thereon to transfer the shares on the books of the bank. After discussion of English cases holding that the transferrer of shares is liable to be treated as a stockholder, until he transfers to one who is in law capable of assuming the liability attaching to the shares, the opinion, by Circuit Judge John F. Dillon, contains the following well considered observations:

> "And if the seller of shares remains liable under the national banking act until there is a registered valid transfer—that is, until some

person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as 'trustee' without Laflin's knowledge. * * * Britton is responsible personally, inasmuch as he had no authority to act for the bank. * * * **If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any** *cestui que trust* **capable of taking and holding the shares.** If the sale of this stock had been registered to Britton individually, it is clear that Laflin would not have been liable to the bank or its creditors; and, as the matter now stands, **the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of him as trustee.**"

The opinion further declared:

"While we maintain the right of a shareholder to dispose of his shares absolutely, by an out-and-out sale and registered transfer, and thus escape liability provided the sale is made bona fide, **and the purchaser is in law capable of assuming the liabilities of the transferrer,** yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank."

In sustaining the judgment of the Court below, in an opinion by Justice Fields, 103 U. S. 800, 803, 26 L. Ed. 532, it is stated:

> "The sale was consummated, so far as Laflin was concerned, when he delivered the certificate, with the power to transfer it to the broker. The latter did not mention the name of the principal for whom he was acting. * * * Laflin had a right, therefore, to treat him as a principal, and, **if he was competent to make the purchase**, the sale was valid."

ENGLISH CASES.

The English rule permits actual, although not colorable, transfers of stock to irresponsible persons, even where the intent of the transfer is to avoid impending liability. This is pointed out in McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, where it is said: "The law is quite different in this country." Yet, the English decisions, notwithstanding this liberality of viewpoint towards transfers of stock, have unequivocally declared and firmly adhered to the rule that the transfer or purchase of shares in the name of an infant will be deemed "utterly fruitless" to relieve the person making the transfer or purchase from liability.

In re Cobre Mining Company (Weston's Case), L. R. 5 Ch. App. 614, Edward Weston purchased, in 1865, 50 shares of stock. Subsequently, to wit, August, 1866, he gave the scrip certificates of his shares to his son Ernest Mortimer Weston, then 17 years old, a clerk in a stock broker's office. On the 15th of October, 1866, Edward Weston instructed his brokers to buy 25

additional certificates in the company for his son. These shares were accordingly purchased in the name of E. M. Weston. On the 8th and 9th of November, E. M. Weston left at the company's office in his own name the certificates for the 75 shares and a receipt was given him. The shares were thereupon registered in the name of Ernest Mortimer Weston in the share registry book. In December, 1868, a resolution was adopted for the voluntary liquidation of the company. Edward Weston was held as a shareholder of the company in respect to the 75 shares.

Lord Hatherly, deciding Weston's appeal against him, said:

> "There is no doubt that the shares were handed over to the son, and that if he had been of full age, he would be and remain upon the register; but he was a boy of 17 years of age, which, of course, was perfectly well known to his father. If this had been a case of simple transfer, the authorities show that the transfer would have been invalid; * * * **because it could not possibly be assumed, after the winding up, that the infant would ever adopt for his benefit the shares which were so handed over to him.** The authorities have completely and clearly decided that it must be taken that, at the time of the winding up, the transaction was utterly fruitless, and that the person who was the original shareholder remains the shareholder, even in cases where he was entirely innocent of the transaction, and not aware that the shares were being transferred to an infant. * * * In other words, in looking at the substance of the case, I must regard Mr. Weston, at

> this moment, as being the holder of the certificates in the name of a person, himself incompetent to be dealt with as in any way the registered proprietor of the shares; and that having so done, he must take the liabilities which attach not only on the shares he originally held, **but on those which he procured in the market.** * * * It appears to me therefore that he must now be liable in respect to the whole number of shares."

See, also, Richardson's case, L. R. 19, Eq. 588, 32 L. T. (N. S.) 18.

Conclusion.

A sound reason exists for the statutory liability which attaches to the ownership of bank stock; and the Federal courts, in passing upon the different phases of national banking laws, have particularly stressed the intent of the banking act to give real, rather than nominal, protection, in the interest of creditors, and also "to give confidence to all dealing with national banks in respect of their contracts, debts and engagements". Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822; Christopher *v.* Norvell, 201 U. S. 216, 50 L. Ed. 732. Neither the acts of the officers of the bank inducing the purchase of bank stock, nor even the contract of the bank itself, can relieve the stockholder from the statutory liability created in favor of creditors. Wehby *v.* Spurway (Ariz.), 246 P. 759, certiorari denied 273 U. S. 722, 71 L. Ed. 858; Lantry *v.* Wallace, 182 U. S. 536, 45 L. Ed. 1218.

The statutory liability of a shareholder in a bank attaches to him from the time he acquires the stock until, without fraud against the creditors of the bank, he relieves himself from it by a *bona fide* transfer. Adams *v.* Johnson (Bowden *v.* Johnson), 107 U. S. 251, 27 L. Ed. 386.

The acceptance of the transfer of bank stock necessarily implies the assent to be bound for the statutory liability on the stock, for, as the ownership of the stock arises from the voluntary act of the stockholder, he must be regarded as having contracted to be subject to such liability. First National Bank *v.* Hawkins, 174 U. S. 364, 43 L. Ed. 1007. The contract to be subject to this liability is not enforcible, however, against the infant because of his legal incapacity to enter into such a contract; and the ownership of the stock, to which the liability is attached by law, thus reverts, of necessity, to the person from whom the infant received the shares assessed. Johnston *v.* Laflin, 5 Dill 65, Fed. Cas. No. 7393; Aldrich *v.* Bingham, 131 Fed. 363.

In the face of the general banking situation as it existed in many sections of the country, and particularly in South Carolina, for several years preceding January, 1926, it may also be reasonably assumed that the defendant, while he may not have supposed the bank was actually insolvent, was undertaking to avoid the liability of a shareholder, and thus to relieve the stock that he had purchased from the ever-present danger of the statutory assessment to which every other shareholder was liable. The situation of the defendant in placing the stock in the names of his infant children,

may, therefore, be aptly characterized by the same comment appearing in Foster *v.* Lincoln's Ex'r (C. C. A., 2d Circuit), 79 Fed. Rep. 170, 172, where it was said:

> **"We have little doubt * * * that the transfer was made to his irresponsible children with intent that, if all come out well, they might have it, while if the bank should meet with disaster, he would not have thrown good money after bad."**

Respectfully submitted,

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APPENDIX.

The Appellee's Positions on Argument Before the Circuit Court of Appeals.

I.

The authority of the cases that we have cited appears to be recognized in appellee's brief for the Circuit Court of Appeals. Foster *v.* Chase and Aldrich *v.* Bingham being referred to, but not critieized. The other cases were not even referred to.

II

The substance of appellee's contention seems to be that he did not assent to become a stockholder, as he did not buy the stock for himself but bought it for his children; the theory being that his assent and assumption of liability were necessary to incur the statutory liability attaching to ownership of the stock.

The lack of merit in this position is clearly apparent by reference to Johnston *v.* Laflin, 103 U. S. 803, where, under very similar circumstances, it was said:

> "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank. * * * But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price paid."

Also, in Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, it was pointed out that the contract between the parties be-

came complete when the certificates of bank stock were assigned and delivered, even though they were not entered on the corporation books. The purchaser of the bank stock, in accepting delivery of the certificates, impliedly agrees to assume the liability which is inseparable from its ownership. As sustaining this principle, the opinion quotes Lord *v.* Hutzler (Md.), 3 Alt. 891, 892, as follows:

> "The object of sale of the stock must have been to denude himself (the transferrer) of all interest in it, and to transfer it to the purchaser. Henceforth all of the advantages arising from the ownership were to accrue to the purchaser. **and all burdens arising therefrom were to be born by him.**"

III.

The appellee takes the position, however, that, having bought the shares for his children, he was acting as trustee for them, citing Fowler *v.* Gowing, 152 Fed. 801.

The difference of facts between the two cases is obvious. The circumstances which were deemed sufficient to establish a trust are discussed at length in the Gowing opinion, where it was said:

> "In the case now before this court, there was the original investment by the father in the name of the children; the taking of the checks payable to 'D. H. Gowing, Trustee, Helen L. Gowing', etc., the investment of the identical money or checks in the bank stock; the declaration to the officers of the bank at the time that he desired to invest the same for the benefit of his children; the issuance to him of the stock as trustee; the opening of the account in the bank

and in its books in relation to same, with Gowing as trustee; the opening by Gowing at the same time of the account in his own books of account. * * * between himself as trustee for these children, naming them, and himself individually, in which he declares the trust and charges himself as trustee with the stock and its dividends; the subsequent purchase of other stock, etc.—all acts and statements declaring the existence in presenti of a trust and showing an intent and purpose to create an irrevocable trust. It seems to me very clear that on the admitted facts it appears satisfactorily and conclusively that **the defendant not only intended to create, but did create and declare orally and in writing, an irrevocable trust for the children.** The title to the stock was in D. H. Gowig, trustee for these children, and not in his individually."

The opinion continued:

> "There is no question in this case that the trust estate represented by D. Henry Gowing, as trustee, is liable for any assessment made against it on account of this stock held for it, but the defendant, D. Henry Gowing, personally, is not, and any assessment made thereon or on account thereof against D. Henry Gowing, personally, is not enforceable against him or collectable of him from his individual estate."

Nor do we think that the purchaser of bank stock can, by the mere declaration of a trust, evade the application of the statutory provision governing stockholders liability. The benefit and burden of the stock go together. If the holder of bank stock still remains liable, although he transfers the stock in good faith to his infant child, it is inconceiable that he should be

permitted to rid himself of the liability by simply declaring an intention to hold the stock as trustee.

In the case of an existing trust, where the trustee purchases bank stock with the trust money belonging to the trust estate, having authority to make such investment, a different principle governs. See Williams *v.* Cobb, 219 Fed. 663; 242 U. S. 307. This also clearly appears from the holding of the Gowing case. The trust estate does not have the benefits of the stock without taking its burdens; and therefore, **"the trust estate * * * is liable for any assessment made against it on account of this stock held for it."** The sequence of this consideration is that there must first be a trust estate and a trustee before the trustee can make a contract that subjects the trust estate to liability.

IV.

The appellee's next point is that a trust may be created and proved by parol, and that "a voluntary trust in South Carolina is as valid as any other kind"; citing Strong *v.* Weir, 47 S. C. 322, and Stone *v.* Hackett, 12 Gray (Mass.) 227.

The correctness of statement of these general principles is unquestioned, but the very cases cited show the lack of application in the present instance.

In Strong *v.* Weir, the Court said:

> "It is also possible for the donor to constitute himself a trustee for the donee. In order to do this, it is only necessary for the owner, in clear and unequivocal language, or by acts amounting to the same thing, to declare that he henceforth holds the choses in action, or property, as trustee for the donee. * * * So, in case of a valid declaration of trust, like other gifts, **when completely executed,** it is irrevocable."

In Strong *v.* Hackett, it was pointed out that—

> "There was a legal transfer of the property, fully executed to the plaintiff. **There was also a full and explicit declaration of trust,** executed by her and delivered to the grantor, by which she accepted the gift and took on herself the execution of the trust which he intended to establish. Nothing therefore was left *in fieri.* The transaction was a completely executed transfer of property, and fully created a trust."

V.

The appelle further contends that since he has purchased the shares for his children, the Court, rather than impose upon him a burden he did not intend to assume, will hold that the facts constitute him a trustee for his children and thus relieve him from personal liability.

Even equitable considerations and principles have well defined limitations. Intentions often stop short of performance; and hence the rule declared in Pomeroy's Equity Jurisprudence (4th Ed.) Sec. 997, that "a voluntary trust which is still executory, incomplete, imperfect, or promissory will neither be enforced nor aided." A like statement of the same principle is found in Eschen *v.* Steers, 10 F. (2d) 739 (C. C. A., 8th Circuit), where Circuit Judge Kenyon said:

> "Intent to create such trust is not sufficient. * * * Donee must have an enforcible, equitable title to create the relationship of *cestui que trust,* and there must be a complete establishment of the fiduciary relationship. * * * Equity will not interfere to perfect an imperfect or defective gift by declaring a trust. * * *

Nor will equity complete and enforce a mere intention or promise to create a trust."

In Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 997, it was also said:

"A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: 1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust; 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee; 3. He may retain the title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into effect. * * * Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the act of donation is simply an assignment of any form, **but is imperfect** so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; **an imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust.** If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust,

but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself.''

No suggestion of intent to create a trust appears in the certified question or in the statement of fact which precedes it. A gift was intended and the act of donation was the delivery of the stock certificates to the bank for the purpose of having the shares transferred directly to the children. The transaction stands on this basis, and, therefore, is governed by the unbroken current of authorities which hold that the stock liability is inseparable from the ownership of the stock, attaching to the shareholder from the time he acquires the stock until he relieves himself from it by a valid transfer to some other person who is in law capable of assuming the liability.